

STATES OF JERSEY



DRAFT MACHINERY OF GOVERNMENT (MISCELLANEOUS AMENDMENTS) (JERSEY) LAW 201- (P.1/2018): AMENDMENT

**Lodged au Greffe on 6th March 2018
by Senator Sir P.M. Bailhache**

STATES GREFFE

DRAFT MACHINERY OF GOVERNMENT (MISCELLANEOUS
AMENDMENTS) (JERSEY) LAW 201- (P.1/2018): AMENDMENT

1 PAGE 22, PART 4 –

In Part 4 –

- (a) delete the heading and sub-heading of Part 4;
- (b) delete Articles 9 to 11 inclusive;
- (c) move Article 12 to follow immediately after the existing Article 16;
- (d) renumber accordingly the Parts and Articles following the deleted Article 11.

2 PAGE 25, PART 5 (RENUMBERED PART 4) –

In the sub-heading delete the word “other”.

3 PAGE 27, ARTICLE 19 (RENUMBERED ARTICLE 16) –

For paragraphs (1), (2) and (3) of the renumbered Article 16 substitute the following text –

“This Law may be cited as the Machinery of Government (Miscellaneous Amendments) (Jersey) Law 201- and shall come into force 7 days after it is registered.”.

SENATOR SIR P.M. BAILHACHE

REPORT

This amendment seeks to delete Articles 9–11 of the draft Law, so that all the implications of creating a single legal entity to represent government can be considered more carefully and without undue haste.

The adoption of this amendment would not affect the introduction of new procedures in relation to the accountability of senior civil servants for the spending of money. The encouragement, and if necessary direction, from the top of collaborative working between different departments would not be affected. Whether or not government is a single legal entity, there will still be different departments. The silo mentality will be tackled irrespective of a change to a single legal entity.

It cannot be denied that the [Draft Machinery of Government \(Miscellaneous Amendments\) \(Jersey\) Law 201- \(P.1/2018\)](#) has been lodged *au Greffe*, and is being debated in unseemly haste. It has not been subject to wide consultation. It introduces substantial constitutional changes, which need, in my view, more careful and mature consideration than the draft Law has yet received. In particular, the proposal to abolish Ministers as corporations sole and to replace them with a new corporation aggregate called the “Jersey Ministers” gives rise to serious questions about the distribution and balance of powers. It confers, in my view, considerable new powers on the Chief Minister, and also, indirectly, on the Chief Executive.

It is noteworthy that a proposal to establish a single legal entity for the Government of the Isle of Man was the subject of a report to Tynwald in October 2014. The report of the then Chief Minister of the Manx Government attached a report to the Council of Ministers by Sir John Elvidge, K.C.B., a former Permanent Secretary of the Scottish Government. Unsurprisingly, perhaps, Sir John’s report recommended the adoption of the Scottish model, of which he was the principal architect. The recommendation was accepted in principle by the Isle of Man Government, but it has not yet been implemented. In April 2016 the Manx Council of Ministers published a consultation response on the proposal to reconstitute the Isle of Man Government as a Single Legal Entity. The consultation showed that a majority agreed that there was merit in the proposal, but that 57% of respondents were in favour of retaining a departmental structure within that entity. A report of a sub-committee examining the merits and practicalities of the proposal reported in July 2017, and stated that the Council of Ministers would be undertaking further work on the matter with a view to reporting in due course to Tynwald.

The Isle of Man Government, and Tynwald, are clearly taking a measured and careful approach to what would be a very significant constitutional change. By contrast, the States are being asked to endorse such change in a matter of weeks. This does not pay sufficient regard to the important role that States Members play in the scrutiny of legislation. Ministers have received a briefing from the Chief Executive on his proposed changes to the departmental structure of government, but it is unclear what is proposed in respect of these new departmental entities and their relationships with Ministers, and indeed the Chief Executive. What is clear is that, if these Articles are adopted, Ministers will cease to exist as corporations sole and will be replaced by the “Jersey Ministers” as a corporation aggregate. What does that mean?

This is a new term in Jersey law, but it is not defined or explained. The new “corporation aggregate” will have “an official seal”, which suggests that there will be only one copy. Where will it be kept? What happens if 2 Ministers seek to make an Order on the same day? Is it the expectation that in future, one Minister will make all Ministerial Orders on behalf of the Jersey Ministers? That would certainly be a legal possibility.

In passing, the term “Jersey Ministers” is itself surprising. Under Scottish legislation, where there is a single legal entity for government, that legal entity is called the “Scottish Ministers”. The term that is generally employed for the Executive in Jersey is the “Government of Jersey”. Whenever an international agreement is signed, it is executed on behalf of the Government of Jersey. The Scottish Ministers constitute a devolved administration of the United Kingdom. Jersey’s constitutional relationship is quite different. It is not part of the UK, nor is it a devolved administration. “Jersey Ministers” seems an inappropriate term.

What does a corporation aggregate do? Who speaks for it? The proposed Article 26 tells us that all ministerial functions can be exercised by any Minister (or Assistant Minister). Most Ministers assume, at present, that they have exclusive responsibility for the functions assigned to them, and that they are accountable to the States for the exercise of those functions. The proposed Article 30A makes it clear that political responsibilities will continue to be assigned to individual Ministers. How does that square with the proposal that any Minister, acting on behalf of the “Jersey Ministers”, is capable in law of undertaking (“doing anything reasonably necessary, expedient for, or incidental to”) any ministerial function? And how does that relate to the duty of Scrutiny Panels to scrutinize a Minister’s performance if some of his functions have been performed by someone else? Political power is being centralized. The only Minister with the authority to call upon any senior civil servant to brief him, or to direct him to act on his behalf, would be the Chief Minister. In a ministerial system of government the Chief or Prime Minister is classically regarded as the first among equals. This system would create a pyramid with the Chief Minister unequivocally at the top. The roles and responsibilities of individual Ministers would be compromised.

Constitutional arrangements should always ensure that there is an appropriate balance of powers. In Scotland, where government is a single legal entity, there is a mature party political system. The First Minister is subject to being held to account by her party. There is no such accountability in Jersey. There is the Council of Ministers, but in future the Chief Minister is to have power to shape his or her own Council.

The introduction of the Principal Accountable Officer (“PAO”) and the interposition of the PAO between a Minister and his Chief Officer, involve a huge shift in departmental relations. No man can serve 2 masters, and the constitution of the PAO, desirable as it may be for other reasons, comes close to creating this classically undesirable division of accountability. It will require diplomacy and sensitivity on the part of Ministers, their Chief Officers, and the PAO to find the right balance so as to ensure harmonious working relationships. We should see how this huge shift works in practice before even considering the creation of government as a single legal entity.

At the lowest, this is a significant constitutional change which requires careful consideration. The proposal has not been considered other than by a small group of officials in or near the Chief Minister’s Department. Insufficient time has been allowed for discussion by Ministers, by the Scrutiny Panel, or by Members in general.

Absolutely no consultation has taken place with members of the Public. The whole process has been rushed. In my view, Articles 9–11 should be withdrawn or, if pursued, rejected by the States pending a proper process of consultation, engagement and prudent consideration.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from the adoption of this amendment.